

IV. IT WOULD BE BOTH UNLAWFUL AND ANTI-COMPETITIVE FOR THE COMMISSION TO MANDATE UNBUNDLING OF THE PROJECT PRONTO OFFERING (FNPRM ¶ 59).

The Commission has also requested comments on the Broadband Offering that SBC makes available in connection with Project Pronto. In particular, the Commission asks whether that offering can or should be made available as a UNE (or combination of UNEs) under the Commission's rules. *See FNPRM ¶ 59*. The Commission cannot – and should not – mandate such an offering on UNE terms.

Not only is any such requirement wholly unnecessary and inconsistent with the *UNE Remand Order*, it would kill the goose that laid the golden egg. As the Commission has recognized, SBC's Pronto initiative will make DSL service available to tens of millions of Americans who would not have access to that service absent SBC's multi-billion dollar investment. Making Pronto subject to the full panoply of UNE obligations would undermine the business case for that investment and would lead SBC to scale back, if not cancel, the installation of DSL-capable Pronto facilities. The end result will be much *less* access to DSL for competitors and, more importantly, consumers, and the elimination of a significant competitive alternative to cable modem service. This proceeding thus presents a paradigmatic instance where short-sighted Commission action threatens to “alter the successful deployment of advanced services that has occurred to date.” *UNE Remand Order*, 15 FCC Rcd at 3835-36, ¶ 307.

A. The Project Pronto Architecture and the Broadband Offering

1. The Broadband Offering allows CLECs to obtain the functionalities of SBC's Project Pronto architecture. Accordingly, to understand the offering, one must first understand the Pronto architecture.

Project Pronto involves the use of the following facilities:

- Copper distribution pairs from a customer premises to the SAI;
- SAIs that interface between the copper distribution pairs and the copper feeder pairs;
- Copper feeder pairs between a SAI and a Project Pronto remote terminal ("RT");
- NGDLC deployed within Project Pronto RTs that provide the capability to offer both voice (*e.g.*, POTS) and data (*e.g.*, DSL) services;
- Separate fibers between the RT and the Central Office (or "CO") for POTS and DSL traffic respectively;
- OCDs deployed in the CO to provide routing and aggregation functionality for DSL traffic;
- NGDLC Central Office Terminals ("COTs") used to provide POTS connectivity to the ILEC local switch and/or CLEC collocation arrangement.

The NGDLC technology provides DSL capability by performing a function that is similar to that of a DSLAM within the RT site. Multiple incoming copper facilities from various customer premises are terminated on the backplane of the NGDLC equipment. The incoming spectrum from these copper facilities is then routed to a line card deployed within a data NGDLC Channel Bank Assembly ("CBA"). For those incoming copper facilities providing both voice and DSL functionality, the line card, in conjunction with

the rest of the NGDLC system, separates the high frequency portion of the loop (*i.e.*, data transmission path) from the low frequency portion of the loop (*i.e.*, voice transmission path). The data transmission path is then packetized within the NGDLC and transported over a packet-switched fiber optic facility (*i.e.*, OC-3c) to the central office. The voice transmission path is routed to a separate Time Division Multiplexed ("TDM") optical transport facility that is provided in a configuration analogous to existing Universal NGDLC.

The data transmission path from the RT terminates in the OCD in the central office. This device provides a routing and aggregation function for data traffic. Inbound ports on the OCD receive the data OC-3c optical signals from all of the Pronto RT sites served out of a given wire center.

Importantly, it is not technically possible to separate the facilities that provide the routing/separating and packet switching at the RT and the CO for the data portions of this service and preserve their functionality. That is, the NGDLC, the connected fiber facility, and the OCD are an integrated unit that are effectively "hard wired" together. From a technical standpoint, the components of the NGDLC, the connecting fiber, and the OCD constitute a packet network. This packet network facilitates DSL transport using Permanent Virtual Circuits ("PVCs"). These PVCs only exist within the logical connectivity established and maintained by the packet network (again consisting of the components of the NGDLC, the connecting fiber and the OCD). Trying to unbundle any one component would result in an inability of the packet network to provide the DSL service. However, that does not limit a CLEC's ability to obtain access, using an

engineered controlled splice, to the copper before it enters the NGDLC, and to perform the very same splitting and packet switching functions with their own equipment.

2. The Broadband Offering provides CLECs – at rates compliant with the 1996 Act’s network element rules – access to both the Project Pronto architecture and SWBT’s existing copper distribution plant. Through PVCs, CLECs are provided the use of the high-frequency portion of the copper facility from the customer premises to the NGDLC RT for data connectivity. They are also given the use of the NGDLC line card that packetizes the incoming data and routes that data to the data-only optical transport facility, the fiber that carries the newly packetized transmission, and the OCD in the central office that separates out and routes the CLEC’s data.⁴⁴ In sum, as the Commission has noted (*FNPRM* ¶ 59), the Broadband Offering gives a CLEC access to switching functions that packetize the CLEC’s data traffic, combine it in a bit stream with that of other carriers, and then separate it back out at the central office.⁴⁵

⁴⁴ Although other varieties of Broadband Offering are also available (*see Project Pronto Order*, 15 FCC Rcd at 17547-48, ¶¶ 47-48), all are the same in the respect relevant here: they rely on the packet-switching and splitting functions of NGDLC line card and the OCD to deliver data traffic to the CLEC.

⁴⁵ CLECs are then provided access to their incoming traffic via the OCD. As mentioned above, the OCD provides a routing and aggregation functionality from the inbound OCD port allocated to an individual RT location to the leased CLEC port within the OCD. CLECs are thus provided a leased port on the OCD in conjunction with the Broadband Offering. This leased port serves all of the RTs providing DSL service outside the central office. Each CLEC’s port is cross-connected to the CLEC’s collocation arrangement within the serving wire center to deliver data traffic to that individual CLEC.

B. The Commission Has Correctly Held That Packet Switching Functionality Is Generally Not Subject To Unbundling; There Is No Reason To Retreat From That Conclusion.

1. The *UNE Remand Order* establishes that packet switching functionalities are normally not subject to unbundling. See 47 C.F.R. § 51.319(c)(3); *UNE Remand Order*, 15 FCC Rcd at 3835, ¶ 306 (“we will not order unbundling of the packet switching functionality as a general matter”); see also *id.* at 3837-38, ¶¶ 311-312 (rejecting e.spire/Intermedia argument that the Commission should unbundle the facilities necessary to “complete ‘virtual circuits’”). Thus, as the Commission reiterated just days ago in a *Clarification Order* in these dockets, the current law is that incumbents need not “provide nondiscriminatory access to unbundled packet-switching capability” except in a “limited set of circumstances.” Order on Clarification, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 & 96-98 (rel. Feb. 23, 2001). The exception to this established rule involves circumstances where, among other things, there is a lack of space for collocation of a DSLAM at the remote terminal and home-run copper is not available. See 47 C.F.R. § 51.319(c)(5). In other words, the Commission has required such unbundling only where there are no alternative methods of reaching an end user served by DLC.

Under this rule, the facilities that make up the Broadband Offering are normally not subject to unbundling. Those facilities – the NGDLC and its line card, the inseparable fiber connection to the central office, and the OCD – provide a *packet switching functionality*. This equipment does not simply transport data from a copper subloop to the central office; rather, as noted above, it separates and packetizes data, combines it into a bit stream, and then separates it out again and routes it at the central

office. Accordingly, the Commission expressly held in its *Project Pronto Order* that line cards within a NGDLC “provide carriers with DSLAM functionality, so that the plug-in cards become ‘functionally equivalent’ to a DSLAM.” *Project Pronto Order*, 15 FCC Rcd at 17528-29, ¶ 14.⁴⁶ DSLAMs are part of “the packet switch network element.” *UNE Remand Order*, 15 FCC Rcd at 3776-77, ¶ 175. Likewise, the functionality provided by the OCD – aggregation and routing of digitized data – falls within the *UNE Remand Order*’s definition of the packet-switching element. *See id.* at 3834, ¶ 304 (“the function of routing individual data units . . . based on address or other routing information contained in the packets” is packet switching); *see also Project Pronto Order*, 15 FCC Rcd at 17524, ¶ 4 n.12 (“The OCD is central office equipment that routes packet signals from several remote terminal sites to a carrier’s packet switched network.”); *id.* at 17531, ¶ 18 (the OCD is a “packet switch[.]”) (internal quotation marks omitted).

Accordingly, the Commission’s current rules generally do not permit CLECs to obtain access to these facilities as UNEs. Only in circumstances where alternative methods of providing DSL service are not available – because, among other things, there is no home-run copper and the CLEC cannot collocate a DSLAM at the RT – are incumbents forced to unbundle these facilities.

2. Because current law clearly prohibits requiring unbundling of these Pronto facilities, the real question here is whether the Commission should turn 180 degrees from

⁴⁶ And in the *FNPRM* itself, the Commission reiterates that the remote terminal equipment “provides DSLAM functionality through the use of a line card, to split the high and low frequency portions of the loop at the remote terminal and route the data traffic . . . to the incumbent LEC’s central office.” *FNPRM* ¶ 59.

the *UNE Remand Order* and require precisely what that order declined to mandate – unbundling of a packet switching functionality.

The Commission has already answered that question. As it explained in the *UNE Remand Order* itself, market participants require certainty and a stable understanding of the competitive landscape: “The new standards and framework we adopt in this Order for determining which network elements incumbent LECs must make available on an unbundled basis will remove the uncertainties surrounding the incumbent’s unbundling obligations since passage of the Act. More importantly, however, they will define the competitive landscape of telecommunications markets for the foreseeable future.”⁴⁷ It would be directly contrary to those goals for the Commission to reverse course on the most significant deregulatory conclusion in the *UNE Remand Order* barely a year after that order was issued.

If such an about-face should ever be made, however, it would only be where there was compelling evidence that it was essential to the preservation of competition and the avoidance of monopoly. That is not remotely the case here. On the contrary, as we now show, the facts that led the Commission to decline to unbundle packet switching are, if anything, even more persuasive today.

3. In the *UNE Remand Order*, the Commission noted that the “presence of multiple requesting carriers providing service with their own packet switches” is “probative” of whether competitors are “impaired” without access to unbundled packet switching. 15 FCC Rcd at 3835, ¶ 306. The Commission then stated that the record in

⁴⁷ *UNE Remand Order*, 15 FCC Rcd at 3700, ¶ 4.

that proceeding and related dockets “establish[es] that advanced services providers are actively deploying facilities to offer advanced services such as xDSL across the country.” *Id.* at 3835-36, ¶ 307. Indeed, the Commission observed, “[c]ompetitive LECs and cable companies appear to be *leading* the incumbent LECs in their deployment of advanced services.” *Id.* (emphasis added). Such “[m]arketplace developments . . . suggest that requesting carriers have been able to secure the necessary inputs to provide advanced services.” *Id.* Moreover, the “equipment needed to provide advanced services, such as DSLAMs and packet switches, are available on the open market at comparable prices to incumbents and requesting carriers alike.” *Id.* at 3836, ¶ 308; *see id.* (“[B]ecause the incumbent LEC does not retain a monopoly position in the advanced services market, packet switch utilization rates are likely to be more equal.”).⁴⁸

The Commission additionally reasoned that a decision requiring that packet switching be unbundled would contravene the Congressional directive that the Commission “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” Telecommunications Act of 1996, Pub. L. No. 104-104, § 706(a), 110 Stat. 56 (reprinted at 47 U.S.C. § 157 note). Because section 706 directs the Commission to consider such investment incentives in this context, the Commission grounded its ultimate decision on this issue in such policy concerns. *UNE Remand Order*, 15 FCC Rcd at 3835, ¶ 306, 3839-40, ¶¶ 314-317. In

⁴⁸ Because of these findings, the Commission expressly concluded that CLECs are not impaired in their ability to serve medium and large business customers. *Id.* at 3835, ¶ 306. The Commission reached no similar conclusion as to residential customers, but the facts as found in the *UNE Remand Order* are inconsistent with a determination of impairment.

particular, the Commission, noting that “investments in facilities used to provide service to nascent markets are inherently more risky than investments in well established markets,” *id.* at 3839, ¶ 314, stressed that its “decision to decline to unbundle packet switching . . . reflects our concern that we not stifle burgeoning competition in the advanced services market,” *id.* at 3840, ¶ 316. “[R]egulatory restraint on our part may be the most prudent course of action in order to further the Act’s goal of encouraging facilities-based investment and innovation.” *Id.*

4. That analysis applies every bit as strongly today. First, the public policy case for declining to unbundle packet switching remains overwhelming. A wide range of providers – including cable companies, fixed wireless providers, satellite service providers, incumbent LECs, and CLECs – are investing enormous sums of money in facilities used to provide broadband service. These providers are engaged in intense intermodal and intramodal competition for broadband customers. As the Commission has recognized, “the number of consumer broadband options within the various broadband technologies” and the existence of “price competition” between those technologies establishes “the competitive nature of the broadband market.”⁴⁹

Given the existence of such a competitive market, further regulation (indeed, any regulation) is not only unnecessary, but counter-productive. First, the asymmetry in the Commission’s regulations – which it now proposes to exacerbate – distorts the market by artificially handicapping the competitive process. The Commission should not be in the business of deciding by regulatory fiat which providers will prevail in the market, and it

⁴⁹ *Fixed Wireless Competition Order*, 15 FCC Rcd at 11867, ¶ 23; *see supra* pages 8-11.

certainly should not adopt an asymmetric regime that pervasively regulates the nondominant industry players, while leaving the dominant participants wholly unregulated.

But the Commission's proposals would not merely distort competition, they threaten to substantially diminish it, by discouraging ILEC investment in broadband facilities. As we have explained, the expansion of the broadband market is dependent on business decisions to deploy new, state-of-the-art facilities. Incumbent LECs will not invest in such facilities, however, if they then become subject to full UNE regulation. The economics simply are not there.

This investment-incentive issue is particularly significant in the context of NGDLC facilities. When incumbents invest billions of dollars to deploy such facilities (SBC's Project Pronto involves a \$6 billion investment), their investment involves much more than conditioning existing loops and adding electronics to make them DSL-capable. Rather, these NGDLC projects create a new overlay network so that end users who could not obtain DSL with their existing loops may now do so. New investment in that overlay network is an absolute prerequisite to the ability of millions of Americans to receive DSL service from an ILEC *or* a CLEC. Indeed, by the Commission's own reckoning, without the deployment of such facilities or other alternative technologies, nearly *half* of the lines in the country could likely never receive DSL service. *See Fixed Wireless Competition Order*, 15 FCC Rcd at 11870, ¶ 29 ("Forty percent to fifty percent of local lines in the National Exchange Carrier Association pools exceed three miles, at or beyond DSL's practical limit of 3.4 miles"). That status quo, of course, would only serve to entrench the broadband dominance of the incumbent cable operators.

But incumbent LECs have little reason to invest in such an overlay network if they must then turn the entire investment over to their competitors at UNE rates and on conditions that allow the competitors to determine the most efficient use of scarce capacity. To be sure, SBC has been willing to provide the non-UNE Broadband Offering for access to its Project Pronto facilities. It has done so, however, only as a transitional matter as a part of the Ameritech Merger Conditions.

SBC, like any other company, is ultimately accountable to its shareholders. As the D.C. Circuit has recognized, it is those “investors rather than ratepayers” that “b[ear] the risk of loss” on investment. *Illinois Pub. Telecomms. Ass’n v. FCC*, 117 F.3d 555, 570 (D.C. Cir. 1997). Accordingly, if SBC is not ultimately allowed to charge a market rate for the use of its facilities, Project Pronto is no longer an attractive use of the company’s investment dollars. Simply put, investments are only made if there is an expectation of a return. If the Commission turns the facilities that SBC and other ILECs are deploying into UNEs, the return those companies could expect for their billions of investment dollars will go down dramatically. To protect its shareholders, SBC will need to rethink whether this investment in facilities is the best use of its investment dollars.⁵⁰

⁵⁰ That is especially so in view of the dramatic impact an unbundling mandate would have on the capacity of a Project Pronto remote terminal. In a typical Pronto configuration, the bandwidth between the remote terminal and the central office is allocated among permanent virtual paths (“PVPs”). Each PVP is dedicated to a single channel bank assembly (“CBA”) and carries all of the traffic generated by that CBA. As discussed above, a typical Pronto RT will have three DSL-capable CBAs. Thus, for each RT, only three PVPs are DSL-capable. If a CLEC leased just a single PVP on an unbundled basis, it would cut by a third the number of DSL consumers that SBC could serve over that RT.

Thus, if the Commission orders full unbundling of Pronto facilities, SBC may ultimately suspend or cancel its installation of DSL-capable facilities, as it has in Illinois. And, by undermining the certainty that the *UNE Remand Order* was intended to provide, the Commission would make SBC and other companies think twice before planning to invest (let alone investing billions of dollars) in facilities that are subject to this Commission's authority.

Nor would the harm end there. Regulations of the type proposed in the *FNPRM* would also discourage CLECs from investing in new advanced services facilities. If the Commission makes available the NGDLC together with the fiber to the CO and the OCD, a CLEC could offer DSL service while investing in little or no facilities of its own. By purchasing those facilities along with a line-shared loop and transport, the CLEC would become little more than a switch-based reseller. Such a CLEC would need only invest in an ATM switch at the location where its ISPs have facilities.

The unbundling proposed in the *FNPRM* would thus discourage investment by both ILECs and CLECs. See 3A Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 773c, at 209 (1996) (unbundling will reduce an entrant's incentives to enter the market by other means); *id.* ¶ 771b, at 175 (when government forces a company to "provide [a] facility and regulat[es] the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether"). To avoid such an unfortunate result, the Commission should heed the warning of the CEO of a facilities-based CLEC (Allegiance Telecom), who recently stressed that the Commission "should place more emphasis on encouraging new entrants to 'invest in their own facilities' and

discouraging 'inefficient forms of competition' such as the use of combined platforms of unbundled network elements (UNE-P) to offer local exchange service."⁵¹

Nor have there been any market developments since the *UNE Remand Order* that would justify the result proposed in the *FNPRM*. On the contrary, the broadband market is booming. The Commission concluded as recently as August 2000 that the growth rate in CLEC market-share for DSL subscribership is *higher* than the growth rate for incumbents. *Id.* ¶ 191. Indeed, *CLECs installed 32% more data switches in 2000 than they had in 1999, and 526% more than they had in 1997.*⁵²

To be sure, some particular data CLECs have experienced tough economic times over the past year. But that was primarily because their ISP customers were not paying their bills.⁵³ As Chairman Powell has rightly explained in reference to these companies' difficulties, business factors, not access to incumbent's networks, were the issue: "Some of it is poor implementation, some of it is poor execution."⁵⁴ In the Chairman's words,

⁵¹ *Rep. Tauzin Eyes "Ambitious" Agenda for Commerce Committee*, TR Daily, Feb. 9, 2001.

⁵² New Paradigm Res. Group, Inc. & Connecticut Research, Inc., *1998 Annual Report on Local Telecommunications Competition*, Ch. 1 at Table 2 (9th ed. 1998); New Paradigm Res. Group, Inc., *1999 Annual CLEC Report*, Ch. 1 at Table 2 (10th ed. 1999); New Paradigm Res. Group, Inc., *CLEC Report 2000*, Ch. 1 at Table 2 (12th ed. 2000); New Paradigm Res. Group, Inc., *CLEC Report 2001*, Ch. 1 at Table 2 (13th ed. 2001).

⁵³ Northpoint's CEO has similarly pointed to factors other than lack of access to explain her company's demise: "I feel there is room enough for one or two independent DLECs . . . who have several million customers so they can get down the cost curve. They can go direct to customers, particularly in the small business market, and offer a full suite of services – not only transport, but the services that use the transport, such as streaming media, ASP services, etc." Mark Holmes, *NorthPoint's Fetter: "We Simply Ran Out of Time,"* Broadband Networking News, Jan. 30, 2001.

⁵⁴ Patrick Ross, *FCC Takes Market Turn with Powell*, CNET News.com (Feb. 6, 2001), available at <http://news.cnet.com/news/0-1004-200-4731304.html>.

“A lot of people showed up at the [Gold Rush], but not everybody went home with the gold.”⁵⁵

Even more fundamentally, it is axiomatic that this Commission’s policies should be designed to benefit consumers, not competitors. And there can be no doubt that, even while some broadband providers have struggled in the last year, consumers have benefited enormously from the aggressive roll-out of broadband facilities across all sectors of the communications industry. In the 17 months since the *UNE Remand Order*, residential broadband subscribership is up nearly **400%** as a whole, and residential DSL subscribership in particular is up over **800%**.⁵⁶ This is exactly the sort of competitive activity that Chairman Powell has explained warrants *less* regulation, not more. The Commission should thus reject this *FNPRM* proposal.

V. THE COMMISSION SHOULD NOT REQUIRE ACCESS TO NGDLC PACKET-SWITCHING FACILITIES UNDER ANY OF THE THEORIES RAISED BY THE *FNPRM* (*FNPRM* ¶¶ 60-64).

The *FNPRM* suggests a variety of labels under which access might be required to the fiber feeder facility between the remote terminal and the central office. The *FNPRM* posits that such access could be required as a form of “fiber sharing” that is part of the

⁵⁵ Rodney L. Pringle, *Powell Wants Less Obtrusive FCC*, Communications Today (Feb. 7, 2001) (alteration in original), available at <http://www.telecomclick.com/newsarticle.asp?newsarticleid=131092>.

⁵⁶ Compare Cable Datacom News, Cable Modem Market Stats & Projections (updated Nov. 9, 1999) (estimating U.S. cable modem subscribers), available at <http://cabledacomnews.com/cm/cmic16.html>; xDSL.com, Deployment (updated Nov. 5, 1999), available at http://www.xdsl.com/content/resources/deployment_info.asp with *The Demise of the DLECs*, Cable Datacom News (Feb. 1, 2001), available at <http://cabledacomnews.com/feb01/feb01-1.html>; xDSL.com, TeleChoice DSL Deployment Projections (updated Feb. 13, 2001), available at http://www.xdsl.com/content/resources/deployment_info.asp.

loop element (§ 61), as shared transport (§ 62), as an unbundled packet switching capability (§ 63), or as part of a UNE platform (§ 64). The issues here are no different than those raised by the proposal to unbundle the Project Pronto Broadband Offering. The core fact is that the connectivity between the RT and the CO is provided by an inseparable group of facilities – the NGDLC, the channel bank, the line card, the fiber, and the OCD – that together provide a packet switching functionality.⁵⁷ Thus, under the Commission's existing rules, those facilities normally are not subject to unbundling. For all the reasons discussed above, the Commission should not reverse course on that rule.

A. “Fiber Sharing” as Part of Access to the Line-Sharing Element.

The Commission has requested comment on “whether it is technically feasible for competitors and incumbents to share the fiber feeder between the remote terminal and the central office” and, if so, whether such “fiber sharing” should be ordered as part of the loop “to permit competitors to obtain access to the line-sharing element.” *FNPRM* §§ 60-61. While such an arrangement is technically feasible in some instances, it is neither properly understood as “sharing,” nor can it – or should it – be required under Commission rules.

Assuming that the Commission's inquiry involves circumstances where a CLEC seeks access to the high frequency portion of the loop (“HFPL”) on line-shared copper subloops, it is technically feasible for an ILEC and one or more CLECs to send electrical

⁵⁷ To the extent there is not an NGDLC or similar facility, and assuming there is no home-run copper, a CLEC would have to deploy its own DSLAM at the RT to obtain the kind of access to fiber for the data portion of the loop (even then, that may not be possible). That circumstance does not appear to be what the Commission terms “fiber sharing” and it is not discussed in these comments.

or optical signals over the same lit fiber between an RT and a central office. However, such an arrangement would not constitute “line sharing” as this Commission has defined it (because it does not involve copper facilities⁵⁸), nor is it even properly understood as a “fiber sharing” arrangement.⁵⁹

Yet whether or not this facility is understood to be “shared,” the key point is that the Commission cannot require this form of unbundling without repudiating its prior precedent. The analysis here is the same as discussed above in the context of Project Pronto.⁶⁰ In this example, as in Project Pronto, the connectivity between the remote terminal and the central office is accomplished through facilities that, among other things, perform a DSLAM-like function in packetizing the data traffic and routing it in a single

⁵⁸ As the Commission explained in Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912, 20923, n.27 (1999), “[l]ine sharing through the simultaneous use of discrete *electromagnetic frequencies on a single wire pair* to provide separate communications services, is the only form of line sharing considered in this Order, and is *only possible on metallic loops*” (emphases added).

⁵⁹ *Id.* at 20923, ¶ 17. A “sharing” arrangement normally involves the ability of two different service providers to offer two services over the same line, with each provider employing different frequencies to transport voice or data over that line. Here, the communications are more properly understood to be “combined” (or multiplexed) into a single bit stream that is then separated at the central office. Even that “combined” access to the HFPL is not possible in all cases, but only where the ILEC has invested the resources to employ DSL-capable digital loop carriers or otherwise has sufficient bandwidth to permit this transmission. In those instances, it is most accurate to say that it is technically feasible to use the packet switching functionality in the NGDLC and the OCD to combine ILEC and CLEC signals, route that traffic to the central office, and then separate out the CLEC’s traffic.

⁶⁰ In this regard, it is not relevant to the analysis that in this example the voice and data traffic are both sent over the same fiber, unlike in Project Pronto. *See FNPRM* ¶ 60 n.130. In both instances, the data transmission carried over the HFPL is packetized, combined in a bit stream and carried over a single facility, and then separated using what can only be understood to be packet switching technology.

bit stream over the fiber so that it can be separated again at the central office. And, contrary to the proposal discussed in the *FNPRM* (§ 61), the Commission has established that such DSLAM functions are not part of the loop:

The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC. The local loop network element includes all features, functions, and capabilities of such transmission facility. Those features, functions, and capabilities include, but are not limited to, dark fiber, attached electronics (*except those electronics used for the provision of advanced services, such as Digital Subscriber Line Access Multiplexers*), and line conditioning.⁶¹

At the same time, the Commission has established that such DSLAM functionalities are part of the packet switching network element, which generally is not subject to unbundling. *See UNE Remand Order*, 15 FCC Rcd at 3776-77, ¶ 175 (“the DSLAM is a component of the packet switch network element”); 47 C.F.R. § 51.319(c)(3).

For all the reasons we have discussed above (*see supra* pages 13-15), reversing course on that point is both unnecessary and unwise. It would have a catastrophic effect on investment incentives in the broadband market and would ultimately harm the millions of Americans who will lack access to DSL absent continuing investment in broadband facilities like NGDLC.

⁶¹ 47 C.F.R. § 51.319(a)(1) (emphasis added).

B. The Access Proposed in the *FNPRM* is not Analogous to Shared Transport.

The Commission has also requested comments on whether the “shared access to the fiber feeder” described by the *FNPRM* is “more similar to the Commission’s definition of shared transport rather than the loop,” and whether the Commission’s shared transport unbundling rules should be “modified” to encompass “transmission facilities between remote terminal equipment and end office switches.” *FNPRM* ¶ 62. Again, the short answer to this argument is that such “fiber sharing” (really, “signal combining”) is not like either the loop or shared transport because it is packet switching. *See supra* pages 13-15.

Indeed, “fiber sharing” does not meet the definition of shared transport, even if one looks solely to the definition of that element. The *Third Order on Reconsideration*⁶² restricted the shared transport element to “transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches in the incumbent LEC’s network.” *UNE Remand Order*, 15 FCC Rcd at 3862, ¶ 370. It makes no sense to consider remote terminal equipment an end office switch for purposes of the Commission’s unbundling rules (and it certainly is not a tandem). The remote terminal and the equipment therein serve a different function from an end office switch. In the *Third Order on Reconsideration*, for example, the Commission emphasized the routing functions performed by the central office switch. *See* 12 FCC Rcd at 12474-75, ¶¶ 22-23,

⁶² Third Order on Reconsideration and Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 12 FCC Rcd 12460 (1997).

12476-77, ¶ 26, 12486-87, ¶ 45. The Commission extended the definition of shared transport to encompass links between two end office switches or two tandem switches to ensure that “requesting carriers [can] utilize the routing tables in the incumbent LEC’s switches.” *Id.* at 12476-77, ¶ 26; *see also id.* at 12486-87, ¶ 45 (“Routing is a critical and inseverable function of the local switch.”). The equipment in a remote terminal, by contrast, has no such routing function; rather, a remote terminal has a dedicated connection to a single central office. The routing function is still accomplished by the equipment contained in the central office. This distinction is particularly important because the Commission’s “impairment” finding as to shared transport is based in part on the existence of this routing function between central offices. *See UNE Remand Order*, 15 FCC Rcd at 3862, ¶ 369; *Third Order on Reconsideration*, 12 FCC Rcd at 12482-83, ¶¶ 36-37.

For all the reasons we have discussed, the definition of shared transport should not be altered to provide access to what the Commission has inaccurately termed “fiber sharing.” Whatever label the Commission attaches to this function, the reality is unchanged. A Commission order requiring unbundling would reverse the *UNE Remand Order*, eviscerate incentives for DSL investment, undermine facilities-based competition, and make even more pronounced the disparity between the Commission’s treatment of cable companies and local exchange carriers providing the same service. Such a decision would be extraordinarily bad policy.

C. The Access Proposed by the *FNPRM* is Packet Switching.

The Commission additionally has requested comment on whether the access it terms “fiber sharing” “can be achieved through purchasing the unbundled packet switching capability,” and whether the Commission’s rules for unbundling packet switching are “adequate to enable competitors to line share when there is fiber deployed in the loop.” *FNPRM* ¶ 63. As SBC has explained throughout these Comments, the access described by the Commission is in fact packet switching, but ILECs normally are not required to unbundle that facility under existing rules. In those cases where entrants are even arguably impaired by a lack of access to packet switching – in particular, where there is no home-run copper and there is no room to collocate at a remote terminal – the Commission’s existing rules do require unbundling. Those rules are thus more than adequate to ensure that competitive carriers can obtain access to the HFPL when NGDLCs are deployed. A rule that would permit access without such impairment is both unlawful and deeply misguided, for all the reasons this Commission correctly explained in the *UNE Remand Order*.

D. A UNE-Data Platform is Unlawful, Unnecessary, and Misguided.

Finally, the Commission asks whether it should toss aside its existing rules and require ILECs to offer a UNE-data platform (¶ 64). Since CLECs already have access to copper subloops and transport, this proposal is really only a slightly more extreme version of the other proposals raised in the prior paragraphs of the *FNPRM*. By turning over to CLECs the packet-switching functionality contained in the remote terminal and the central office along with the inseparable fiber transmission capacity, each of these proposals would give CLECs a turn-key network that generally would require them, at

most, to invest in an ATM switch at a distant site where their ISP customers' facilities are located.

The notion of creating such a platform in the broadband market is, to say the least, perverse. As former FCC Chairman Reed Hundt has testified, the "UNE-platform" is just "a version of resale."⁶³ Chairman Hundt further explained that "real competition" comes not from encouraging such resale (at rates considerably lower than the resale rates provided for in the statute) but through the "facilities based" competition "that brings investment and innovation."⁶⁴ Or, as an independent analyst has said of the voice UNE-P, the "consequence of the FCC's strategy has been to effectively devalue all infrastructure investment by everyone, incumbents and competitors alike, whether it is fiber, cable, or fixed wireless. . . . Why overbuild if one can lease it more cheaply than one can build it? We strongly suspect that the success of the UNE-P resale will adversely affect the incentive for facility-based competition."⁶⁵ As noted above, facilities-based CLECs echo this sentiment. *See* TR Daily, *supra* note 51 (Allegiance Telecom CEO states "that the FCC should place more emphasis on encouraging new entrants to 'invest in their own facilities' and discouraging 'inefficient forms of competition' such as the use of combined platforms of unbundled network elements (UNE-P) to offer local exchange service.").

⁶³ Transcript of Illinois Commerce Commission Open Meeting at 235 (July 14, 1998).

⁶⁴ *Id.*

⁶⁵ *Prepared Statement of Mr. Scott Cleland, Managing Director of the Legg Mason Precursor Group Before the House Commerce Committee, Subcommittee On Telecommunications Trade & Consumer Protection*, Federal News Service, May 25, 2000.

However much SBC disagrees with the platform concept in the voice market, introducing such a platform in the distinct broadband markets would be worse by many orders of magnitude. As the Commission has recognized, the broadband market is “nascent.” *UNE Remand Order*, 15 FCC Rcd at 3839, ¶ 314. It is being developed right now – through massive investments in facilities by ILECs, CLECs, cable companies, and other providers. There is no surer way to dissuade CLECs from investing than allowing them to provide service by free-riding on the facilities that incumbents have deployed and the investment risk the incumbents have undertaken. And there is no surer way to discourage incumbents from investing in facilities than to require them to turn those facilities over to competitors. The result will be much lower rates of deployment of DSL facilities.

Under no theory is that result in the public interest, especially since the Commission has found that no monopoly exists or likely will ever exist in this market⁶⁶ – a market in which cable companies, not ILECs, have the lion’s share of customers. In sum, it is difficult to imagine any proposal that is less in keeping with Chairman Powell’s belief that “deregulation is . . . a critical ingredient to facilitating competition” than a rule that would apply the most extreme elements of regulation over ILEC voice services to the broadband market.⁶⁷ The Commission should reject this proposal.

⁶⁶ *First Advanced Services Report*, 14 FCC Rcd at 2423-24, ¶ 48.

⁶⁷ Pringle, *supra* note 55 (emphasis added).

CONCLUSION

For the foregoing reasons, the Commission should reject the *FNPRM* proposals as inconsistent with law and sound competitive policy.

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CERTIFICATE OF SERVICE

I, Heather Hauser, hereby certify that on this 27th day of February 2001, one copy of the foregoing "Comments of SBC Communications Inc." was served on the following parties by hand delivery:

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